In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1006

JOE LEWIS AND TOMMY ALLEN COMBS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the Tenth Amendment requires that this Court follow the decision of a state court in a case where there are conflicting state and federal appellate court decisions on the reasonableness of a particular search and seizure, (2) that the search and seizure here were in fact unreasonable, and (3) that the location of the trial at Pikeville rather than Jackson, Kentucky, both of which are within the Eastern District of Kentucky, violated 18 U.S.C. 3240 and the Sixth Amendment.

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of transporting stolen explosive materials, in violation of 18 U.S.C. 842(h). Each was sentenced to a four-year term of imprisonment subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed, 504 F.2d 92 (Pet. App. 1a-25a).

1. The evidence at trial showed that on September 3, 1972, Sunday night of Labor Day weekend, at about 11:40 p.m., two Kentucky state policemen were in a rural area of Perry County, Kentucky, investigating a complaint about a drunken driver in a red pickup truck (Tr. 8-11, 23, 42). The officers stopped a 1961 red Chevrolet pick-up truck that petitioner Lewis was driving and in which petitioner Combs was a passenger. The officers stopped the vehicle because it fit the description of the complaint, and because it had a loud muffler and no tail lights (Tr. 11). The truck had a home-made camper body on the back, was marked "General Construction Company," and appeared heavily laden (Tr. 31, 41). The officers parked their automobile six to eight feet behind the truck, its headlamps illuminating the rear of the truck (Tr. 11). As the officers approached the truck they observed boxes marked "Danger electrical blasting caps" through a window at the rear of the camper (Tr. 11; Pet. App. 2a, n. 2). At the front of the truck, Officer Thompson recognized petitioner Lewis, whom he knew was an ex-convict (Tr. 12, 34; Pet. App. 20a), and requested Lewis' driver's license. After the officer observed two .22 caliber rifles in the truck cab, he ordered both petitioners out of the truck (Tr. 12). When Officer Thompson asked petitioner Lewis what he was hauling (Tr. 265), Lewis replied that he did not know and that the truck did not belong to him (Tr. 266). Officer Thompson then asked Lewis to open the back of the truck and Lewis responded that he did not know how to open the back (Tr. 266), that he "had no authority to open it up" (Tr. 291), and that if Officer Thompson wanted it opened, he should open it himself (Tr. 12, 33, 266).

At this point, Officer Thompson opened the back of the truck, observed blasting caps in boxes, and placed petitioners under arrest (Tr. 12). Officer Thompson then

removed from the truck the two .22 caliber rifles, a tire tool, and a pair of bolt cutters lying on the floor of the cab in open view (Tr. 12, 50). Peitioners were then taken to the local jail (Tr. 58). Although a tow truck was called, for safety reasons the pickup truck was not towed but driven to an area where there were no houses (Tr. 60). The contents of the truck were then photographed, inventoried, and the more than 1,800 dynamite blasting caps discovered were removed to a powder magazine storage facility for safekeeping (Tr. 61; Pet. App. 3a).

Subsequently, the officers discovered that the blasting caps were stolen in a nearby county from the R. C. Durr Construction Company, a company for which petitioner Lewis had worked (Tr. 65-67, 152-153). At trial, the owner of the truck testified that there were no blasting caps in the back of the truck when he loaned it to petitioner Lewis (Tr. 247). Officer Thompson testified that petitioners were arrested for the traffic violations, for transporting the unmarked dynamite and for possession of burglary tools, *i.e.*, the tire tool and bolt cutters (Pet. App. 17a-18a).

2. By order dated December 15, 1972, the judges of the United States District Court for the Eastern District of Kentucky, in order to expedite the business of the court, eliminated Jackson, Kentucky, as a location in which the court would sit and reassigned petitioners' case, along with all the others then pending on the Jackson Docket which had arisen in Perry County, to Pikeville, Kentucky (Pet. App. 29a-30a). On August 1, 1973, the court again issued an order reassigning twenty-one cases because of overcroweded dockets and speedy trial problems (Pet. App. 32a). In its order that reassigned petitioners' case to Lexington, Kentucky, the court noted that it had given due consideration to each defendant and

to the witnesses in each case.[1] On September 10, 1973, petitioners objected to the transfer of their case from Jackson to Lexington on the ground that it involved extensive travel for "practically all of the witnesses" and "defendants' counsel resides at Pikeville, and that they can ill afford the expenses and fees necessary to have their attorney journey to Lexington for trial * * *" (Pet. App. 32a-33a). After petitioners' first trial ended in a jury disagreement on September 12, 1973, petitioners' case was reassigned to Pikeville, where they were then tried and convicted on October 29-31, 1973.

3. On September 27, 1974, eleven days before the decision of the court below, the Kentucky Court of Appeals reversed petitioners' state convictions for illegally breaking and entering the R. C. Durr Construction Company powder magazine on the ground that the blasting caps discovered in the back of the truck should have been suppressed because the arresting officers in the circumstances described above had no probable cause to believe that petitioners "had committed a crime or that the truck contained contraband" (516 S.W. 2d 105; Pet. App. 28a).

Petitioners contend (Pet. 9-12) that the Tenth Amendment requires that this Court follow the decision of the Kentucky Court of Appeals that the search of the red pickup truck was illegal (Pet. App. 27a-28a).[2] However,

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[1]We are lodging a copy of the district court's August 1, 1973, order with the Clerk of this Court.

[2]It is not clear whether the state court's decision rested upon the Fourth Amendment or Section 10 of the Kentucky Constitution, which provides:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

federal courts are not required to follow state law respecting the search and seizure, as this Court stated in *Elkins* v. *United States*, 364 U.S. 206, 223-224:

> In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

Petitioners contend that the United States is collaterally estopped from asserting the validity of the search because of the decision of the Kentucky courts that the search was illegal. But the United States is a separate sovereign, was not a party to that proceeding, and is not estopped. Cf. *Bartkus* v. *Illinois*, 359 U.S. 121; *Abbate* v. *United States*, 359 U.S. 187.

4. Petitioners also contend (Pet. 10-11) that, on the facts of this case, the officers lacked probable cause to search the camper. That issue, which turns upon its particular facts and which the district court and the court of appeals resolved against petitioners, does not warrant further review. In any event, as we discuss hereafter, the search may be justified as an appropriate emergency measure to protect the public safety.

a. The officers stopped the petitioners' vehicle for traffic infractions at about midnight on a Sunday of a Labor Day weekend. They observed a large supply of blasting caps in the bed of the truck, which appeared heavily laden. They recognized one of the petitioners as a former convict and observed guns in the cab of the truck. Despite the obvious heavy load of dangerous materials, the peti-

tioners denied any knowledge of the nature of their cargo. The court of appeals was not clearly wrong in concluding that the officers "had more than a 'bare suspicion' that the blasting caps were stolen" (Pet. App. 19a).

b. In any event, the search conducted here was reasonable as a necessary emergency measure to insure the safety of the general public. The truck contained boxes marked "Dangerous electrical blasting caps," it was being driven at night without tail lights, and its driver had told the officer that he was ignorant of its contents. The officers were justified in searching the vehicle in order to assure themselves that the unsafe, inadvertent, or improperly designated carriage of this highly explosive material on the public highway, see Ky. R. S. 189.160 (Pet. App. 18a), did not constitute a serious and immediate danger to the officers or the general public. In these circumstances, the search of the pickup truck was reasonable. Cf. *Cady* v. *Dombrowski*, 413 U.S. 433, 448; *Camara* v. *Municipal Court*, 387 U.S. 523, 539; *See* v. *City of Seattle*, 387 U.S. 541. In fact, when the officers verified what their view through the camper's rear window had revealed—that highly explosive material was being transported on the public highway in an improper manner—they immediately arranged to remove it from the public highway to a secluded spot.[3]

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[3]In addition, we submit, by their actions prior to the search, petitioners relinquished any rights they might otherwise have had to complain about the instant search. When Officer Thompson asked permission to open the back of the truck, petitioners represented that they had no responsibility for or interest in it. Petitioner Lewis stated that he could not give permission to search the back of the truck because he had neither control over it nor knew its contents or how to open it (Tr. 266, 291). Petitioner Combs, who stood mute at the time of the search, also testified that he did not know the contents of the back of the truck (Tr. 267). Having led the officers to believe at the time of the search that petitioners had no

5. Finally, petitioners contend (Pet. 12-17) that their Sixth Amendment rights were violated because the venue of their second trial was laid in the wrong judicial division of the Eastern District of Kentucky. Petitioners misconceive the facts. In the first place, there are no judicial divisions in the Eastern District of Kentucky, see 28 U.S.C. 97.[4] Even if there had been a transfer between divisions, in 1966 Congress specifically eliminated the requirement in Rule 18, Fed. R. Crim. P., that a criminal trial must be held in the judicial division where the offense arose. Advisory Committee Note to 1966 Amendments to Rule 18, 18 U.S.C. App., pp. 4497-4498. In addition, the record does not show that petitioners renewed their claim prior to their second trial, which was held in Pikeville, Kentucky, where petitioners had previously indicated that their attorney practiced. In short, since it is not disputed that petitioners were tried within the judicial district where the offense arose, their Sixth Amendment rights were not violated. *United States* v. *Fernandez*, 480 F.2d 726, 730 (C.A. 2); *United States* v. *Florence*, 456 F.2d 46, 49-50 (C.A. 4). See also, *United States* v. *Anderson*, 328 U.S. 699, 704-705.

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privacy or any other interest in the back of the pickup truck, that they could take no responsibility for allowing a search, and that the officers could do as they wished, petitioners cannot now complain that the search of the back of the truck adversely infringed upon their reasonable expectations of privacy.

[4]The absence of judicial divisions makes the claim under 18 U.S.C. 3240 (dealing with prosecution in newly created divisions) meritless, as the court below concluded (Pet. App. 10a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.